

155 FERC ¶ 61,129
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

PJM Interconnection, L.L.C.

Docket No. ER13-349-001

ORDER DENYING REHEARING

(Issued May 3, 2016)

1. This order addresses City Power Marketing, L.L.C.'s (City Power) request for rehearing of the Commission's January 8, 2013 order.¹ City Power asserts that the Commission erred in accepting PJM Interconnection, L.L.C.'s (PJM) proposal to terminate City Power as a PJM member. We deny City Power's request for rehearing, as discussed below.

I. Background

2. On November 9, 2012, PJM filed proposed revisions to Schedule 12 of the Operating Agreement to permanently terminate City Power's membership in PJM in accordance with sections 15.1.6(c) and 4.1(c) of the Operating Agreement, on the ground that City Power had failed to make timely payments of its invoices twice during a rolling 12-month period.² Specifically, PJM argued that City Power failed to pay its June 2012 invoice of \$17,139,172.05 based on recoupment of erroneously paid refunds in the

¹ *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,019 (2013) (January 8, 2013 Order).

² If during any rolling 12-month period a member fails to make timely payments when due twice, or adhere to any of its credit obligations to PJM three times, then its membership shall be terminated and its forward market positions will be liquidated. PJM, Intra-PJM Tariffs, Operating Agreement, Schedule 12 (9.0.0); PJM, Intra-PJM Tariffs, Operating Agreement, § 15.1.6(c) (2.0.0); *Id.* § 4.1(c) (0.0.0).

Black Oak proceedings,³ and its August 2012 invoice for \$927.24 based on Balancing Operating Reserve charges from May and June 2009. Among other things, PJM argued that the pending appeals before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in the *Black Oak* proceedings do not preclude termination of City Power, City Power's resort to the PJM dispute resolution procedures does not stay the termination, and the PJM Open Access Transmission Tariff's (Tariff) two-year limitation on billing adjustments does not apply to the invoices at issue.⁴

3. City Power protested PJM's filing, explaining that it was unable to pay its June 2012 invoice or post additional credit of \$25,223,500, and that its sole employee was out of the country when PJM tendered the August 2012 invoice. City Power stated that it had offered to pay the August 2012 invoice but PJM would not rescind the default notification, so it did not pay the invoice. City Power argued, *inter alia*, that the August 2012 invoice amount is not material and that PJM was prohibited from making the adjustments in the invoice because PJM did not provide notice to City Power within the two-year period (from billing month to the adjustment) as required by the Tariff.⁵ City Power also asserted that PJM had denied City Power its right to appeal the termination decision under section 15.1.6(d) of the Operating Agreement by failing to seriously consider its appeal request or refer the matter to alternative dispute resolution.⁶

³ See *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013 (2016)

⁴ With respect to the two-year limitation on billing adjustments, the Tariff reads:

No claim seeking an adjustment in the billing for any service, transaction, or charge under the OATT may be asserted with respect to a month, if more than two years has elapsed since the first date upon which the billing for that month occurred. The Transmission Provider and PJM Settlement may make no adjustment to billing with respect to a month for any service, transaction, or charge under this OATT, if more than two years has elapsed since the first date upon which the billing for that month occurred, unless a claim seeking such adjustment had been received by the Transmission Provider prior thereto.

PJM, Intra-PJM Tariffs, OATT, § 10.4(a) (Limitation on Claims) (1.0.0); *see also* PJM, Intra-PJM Tariffs, Operating Agreement, § 15.6(a) (Limitation on Claims) (1.0.0).

⁵ Request for Rehearing at 19; *see also id.* at 3-4.

⁶ *Id.* at 7. Section 15.1.6(d) reads:

4. In the January 8, 2013 Order, the Commission found that City Power had defaulted the first time when it failed to pay the approximately \$17 million June 2012 invoice. The Commission found that the invoice was not prohibited by the two-year limitation on the rebilling provision of section 10.4 of the OATT, because City Power was on notice at least as early as July 21, 2011.⁷ The Commission concluded that City Power had defaulted a second time during a rolling 12-month period when it failed to pay the approximately \$927 due in the August 2012 invoice. The Commission stated that neither section 10.4 of the OATT nor Commission precedent required PJM to provide written notice within a two-year period to potentially-affected entities when another party makes a claim for adjustment, as was the case in the August 2012 invoice.⁸ Therefore, the Commission concluded that PJM had sufficiently demonstrated that City Power failed to make timely payments when due twice during a rolling 12-month period and that City Power's termination was just and reasonable.⁹

A Member *may appeal* a determination made pursuant to the foregoing procedures utilizing PJM's dispute resolution procedure as set forth in Schedule 5 of this Agreement, (provided, however, that a Member's decision to utilize these procedures shall not operate to stay the ability of PJM to exercise any and all of its rights under this Agreement and the PJM Tariff) *and may be reinstated* provided that the Member can demonstrate the following: (a) that it has otherwise consistently complied with its obligations under this Agreement and the PJM Tariff; and (b) the failure to comply was not material; and (c) the failure to comply was due in large part to conditions that were not in the common course of business.

PJM, Intra-PJM Tariffs, Operating Agreement, § 15.1.6(d) (2.0.0) (emphasis added).

⁷ January 8, 2013 Order, 142 FERC ¶ 61,019 at P 26 (citing the first *Black Oak* rehearing order, *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 (2011), which addressed the refunds issue).

⁸ January 8, 2013 Order, 142 FERC ¶ 61,019 at P 28.

⁹ *See id.* P 31; *see also* PJM, Intra-PJM Tariffs, Operating Agreement, § 15.1.6 (c) (2.0.0) ("A Member that has been declared in default of this Agreement for failing to: (i) make timely payments when due twice during any prior 12 month period ... shall be terminated").

II. Request for Rehearing

5. In its February 5, 2013 request for rehearing of the January 8, 2013 Order, City Power asserts that the Commission erred by allowing PJM to violate its Operating Agreement in denying City Power a right to an appeal of PJM's decision to terminate City Power's membership.¹⁰ City Power argues that PJM denied its right to an appeal by (1) failing to refer the case to an Alternative Dispute Resolution Coordinator as required under section 3.1 of Schedule 5 of the Operating Agreement, (2) making no effort to engage in good faith negotiations, and (3) failing to allow for non-binding mediation of the dispute prior to initiating a regulatory proceeding.¹¹ In addition, City Power contends that the Commission erred in interpreting the Operating Agreement to allow PJM to terminate a company's membership and pursue a Commission filing without allowing time for the dispute resolution process to proceed, because this interpretation (1) moots the provision of the Operating Agreement that allows for a dispute resolution process and (2) could lead to two contradictory outcomes where the Commission approves such a filing and the mediation process reverses PJM's determination or the parties come to an agreement.¹²

6. According to City Power, it meets the test for reinstatement under section 15.1.6(d) of the Operating Agreement because, before the first default, it had always timely paid its bills and posted all required collateral. City Power states that for the Commission to include the defaults for which the member was terminated in its analysis of the first prong of the reinstatement test would mean no market participant could ever meet the test.¹³ City Power also claims that it meets the test because its noncompliance was not material. In response to PJM's argument that the two defaults combined to make the noncompliance material, City Power states that PJM failed to acknowledge that the legitimacy of the first default was still pending before the court at that time and that City Power had offered to cure the second default within 48 hours of the default notice. City Power further argues that the defaults were not in the ordinary course of business.

¹⁰ Request for Rehearing at 7.

¹¹ *Id.* at 7-8.

¹² *Id.* at 8-9.

¹³ *Id.* at 18.

7. City Power also argues that, in any case, premature termination was unreasonable on its face because there was no threat to the membership or market that would justify an immediate termination request, given that City Power had not traded in the PJM market since City Power's voluntary suspension and did not seek reinstatement.¹⁴ City Power contends that there is no justification for termination without a full dispute resolution process, because the first default was due to the *Black Oak* proceedings, which were pending before the D.C. Circuit, and PJM did not notify other PJM market participants of the second rebilling that led to City Power's second claimed default.¹⁵

8. City Power maintains that the January 8, 2013 Order erred in holding that both the first default and second default do not violate section 10.4 of the Tariff, which requires notice to market participants prior to reconciliation of a bill and puts a two-year limit on adjusting bills.¹⁶ With respect to the first default, City Power states that, while its protest did not address the first default, the amounts at issue for the first default were time barred. In addition, City Power claims that PJM's request for clarification of the July 2011 Order shows that there was not proper notice to any party.

9. With respect to the second default, City Power contends that the default was time-barred because a claim seeking an adjustment "must be made to PJM *and* noticed within two years of the first date upon which the billing for the months at issue occurred."¹⁷ City Power argues that the Commission's interpretation of section 10.4 as only requiring notice to PJM and not to its market participants is illogical because it is the market participants who need the notice since they will be billed for any reconciliation. City Power also argues that the January 8, 2013 Order erred by finding that section 10.4 does not require such notice to be written notice; according to City Power, a recent Commission order noted that section 18.14(a) of the Operating Agreement requires notice to its members in writing.¹⁸ City Power asserts that the notice requirement in section 18.14(a) does not distinguish between an error by PJM and a request for reconciliation by another market participant. Accordingly, City Power claims that, because PJM did not

¹⁴ *Id.* at 9-10.

¹⁵ *Id.*

¹⁶ *Id.* at 10-11.

¹⁷ *Id.* at 14 (referring to section 10.4 of the Tariff).

¹⁸ *Id.* at 15 (citing *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,030, at P 37 (2012)).

notify its market participants of a potential billing error within two years of the first date upon which the billing for that month occurred, at least \$854.96 of the August 2012 invoice (which amount was outside of that period) was time barred.¹⁹ City Power states that to allow \$927.24 of unnoticed, time-barred charges to become the basis for permanent termination of a PJM member would be establishing a harmful and dangerous precedent.

10. City Power contends that the January 8, 2013 Order erred in accepting PJM's filing because PJM failed to provide evidence that the second default was legitimate, and, therefore, PJM did not meet the requirements of FPA section 205.²⁰ City Power states that PJM did not submit evidence of or disclose the nature of the billing error, where the billing error occurred, the reason for the error, the name of the party that notified PJM of the error, and when that notice of the error was provided to PJM.²¹ City Power also states that PJM has failed to address the discrepancy regarding the remaining \$72.28 that led to the second default, having in its filing characterized all of the second default as 2009 Balancing Operating Reserve billing adjustments while the invoice refers to the \$72.28 as May 2012 Planning Period Uplift.²² However, since City Power was not transacting in PJM in May 2012, City Power argues that it is hard to imagine how it could have incurred uplift charges, and PJM has not addressed the discrepancy.²³

11. On February 20, 2013, PJM filed an answer to the City Power rehearing.

III. Discussion

12. Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2015), prohibits answers to rehearing requests and we therefore reject PJM's answer.

¹⁹ *Id.* at 16. The amounts due from City Power for the May 2009 billing month (\$690.69) and June 2009 billing month (\$164.27) total \$854.96.

²⁰ *Id.* at 21.

²¹ *Id.* at 22.

²² City Power refers to both a \$72.24 line item, and a \$72.28 line item, from PJM's invoice. The correct amount is \$72.28. *See* City Power, Motion to Intervene and Protest, Docket No. ER13-349-000, Ex. A at 2 (filed Nov. 30, 2012).

²³ *Id.* at 23.

13. We deny rehearing. We reiterate that PJM's Operating Agreement requires that a member who has been declared in default of the Operating Agreement for failing at least twice to make timely payments when due during any prior 12-month period shall be terminated.²⁴ Once terminated, that member may request an appeal and possible reinstatement, provided the member can demonstrate that the member otherwise has consistently complied with its obligations under the Operating Agreement and the Tariff; that the failure to comply was not material; and that the failure to comply was due in large part to conditions that were not in the common course of business.²⁵ In this case, PJM sufficiently demonstrated that City Power had defaulted on its June 2012 invoice for \$17,139,172.05 and on its August 2012 invoice for \$927.24.²⁶ City Power has not presented any newly persuasive evidence to contradict these findings, nor has City Power demonstrated any legal error in the Commission's findings.

14. City Power alleges that the relevant billing adjustments were time-barred because a claim seeking an adjustment "must be made to PJM *and* noticed within two years of the first date upon which the billing for the months at issue occurred."²⁷ With respect to the \$17 million default, we do not find the tariff provision controlling because PJM was not correcting a billing error but was implementing a Commission order on rehearing implicating the adjusted billing.²⁸ In this situation, the two-year limit applicable to billing adjustments does not apply. But even if the two-year period did apply following a Commission order that necessitated such adjustment, the Commission's July 21, 2011 rehearing order was issued within two years of the billing month (i.e., March 2010) and provided sufficient notice that subsequent billing adjustments could be necessary. PJM even informed those parties that it would seek such repayment within the two year period.²⁹ Further, we find PJM reasonably postponed issuance of its invoice to City

²⁴ January 8, 2013 Order, 142 FERC ¶ 61,019 at P 25 & n.30 (citing PJM, Intra-PJM Tariffs, Operating Agreement, § 15.1.6(c) (2.0.0)).

²⁵ *Id.* § 15.1.6(d) (2.0.0).

²⁶ *See* January 8, 2013 Order, 142 FERC ¶ 61,019 at PP 26, 28.

²⁷ Request for Rehearing at 14 (referring to section 10.4 of the Tariff).

²⁸ PJM, Filing, Docket No. ER13-349-000, at 5 (filed Nov. 9, 2012) (PJM Filing).

²⁹ Request of Financial Marketers for Clarification, or, in the Alternative, Request for Rehearing, Motion of Financial Marketers Not Currently Parties for Leave to Intervene Out-of-Time, and Emergency Motion for Issuance of Stay Within Seven Days, Docket No. EL08-14-003, *et al.* (filed Aug. 3, 2011).

Power until June 2012, after the Commission had affirmed its July 21, 2011 rehearing order on May 11, 2012.³⁰

15. City Power's second default is a collection of billing adjustments for the billing months of May 2009 (\$690.69), June 2009 (\$164.27), and May 2012 (\$72.28). As we previously explained, the two-year limitation is satisfied here because the tariff provides an exemption for billing adjustments identified by third parties. In this instance, it was a member of PJM who had sought billing corrections beginning in September 2009, well within the two-year limit.³¹ Section 10.4 of the Tariff provides that PJM cannot seek a billing adjustment for any month if more than two years has elapsed since the first date upon which the billing for that month occurred "unless a claim seeking such adjustment had been received by the Transmission Provider prior thereto."³² This exemption permits PJM to investigate and correct billing errors identified by third parties as long as the third party brings the matter to PJM within the two year period, as here. However, even if we were to consider the May and June 2009 billing months to be outside the two-year limit,

³⁰ See *supra* note 3.

³¹ January 8, 2013 Order, 142 FERC ¶ 61,019 at P 28; *see also* PJM Filing at 6 (stating, "a member [of PJM] had sought billing corrections beginning in September, 2009, months after the first invoice").

City Power cites *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,030, at PP 36-37 (2012), for the proposition that the bill being corrected must be no more than two years before the date on which PJM formally notifies the customer that it is correcting the bill, and that in this case the two 2009 bills were outside that two-year limit. (Request for Rehearing at 15 & n.7.) But this case deals with the time period for rebilling when PJM itself identifies a billing adjustment, not when such an adjustment is first identified by a third party. When a third party identifies the billing adjustment, the time period is two years prior to the date on which the third party notifies PJM.

³² Section 10.4(a) reads:

The Transmission Provider and PJM Settlement may make no adjustment to billing with respect to a month for any service, transaction, or charge under this OATT, if more than two years has elapsed since the first date upon which the billing for that month occurred, *unless a claim seeking such adjustment had been received by the Transmission Provider prior thereto.*

PJM, Intra-PJM Tariffs, OATT, § 10.4(a) (Limitation on Claims) (1.0.0) (emphasis added).

the August 2012 invoice (notice) is mere months from the May 2012 billing month (recording \$72.28).

16. Finally, with respect to its request for appeal, City Power alleges, among other things, that PJM denied City Power's right to appeal the termination decision under section 15.1.6(d) of the Operating Agreement by failing to refer the case to dispute resolution, engage in good faith negotiations, and allow non-binding mediation of the dispute prior to initiating a regulatory proceeding.³³ City Power contends that it meets the three-prong test for reinstatement under section 15.1.6(d) because, before its first default, City Power had always timely paid its bills.³⁴

17. As we previously found, section 15.1.6(d) does not require reinstatement but provides PJM with discretion whether to reinstate a defaulting party if the party meets the requirements of the tariff. Section 15.1.6(d) provides that "a Member's decision to utilize these [dispute resolution] procedures shall not operate to stay the ability of PJM to exercise any and all of its rights under this [Operating] Agreement and the PJM Tariff." Thus, PJM properly filed with the Commission to terminate City Power prior to PJM's consideration of the termination appeal. Following a decision to terminate, section 15.1.6(d) provides that a member "*may* be reinstated provided that the Member can demonstrate" that it has met three requirements (emphasis added).³⁵ City Power did not meet the three criteria. First, City Power's continuous failure to pay its invoices does not satisfy the condition that it has "otherwise consistently complied with its obligations under this Agreement." We are not persuaded by City Power's argument that, in determining whether a member has consistently complied with its obligations, the defaults at issue should not be considered where, as here, the customer still has failed to pay outstanding invoices. Second, we find that its default on the \$17 million invoice is material.³⁶ Third, City Power's failure to pay the May 2009 (\$690.69), June 2009

³³ See Request for Rehearing at 7-8.

³⁴ *Id.* at 18. Section 15.1.6(d) treats both the appeal of and reinstatement from the termination decision, provided certain criteria are met (so-called three-prong test).

³⁵ *Id.* The three requirements include: (1) that the entity otherwise has consistently complied with its obligations under the PJM Operating Agreement and Tariff; (2) its failure to comply at issue was not material; and (3) its failure to comply was due in large part to conditions that were not in the common course of business. PJM, Intra-PJM Tariffs, Operating Agreement, § 15.1.6(d) (2.0.0).

³⁶ City Power did not raise on rehearing its prior argument that all of the defaults must be material. Nonetheless, we have not found any requirement in the Operating Agreement, Tariff, or other governing document that for termination all defaults must be

(\$164.27), and May 2012 (\$72.28) invoices does not satisfy the third criterion; namely, City Power has not made the case that its failure to comply was due in large part to conditions that were not in the common course of business.³⁷ City Power's failure to repay the \$17 million invoice also is within the ordinary course of business, as customers of regulated utilities need to anticipate the potential need to repay amounts based on the Commission's grant of rehearing.³⁸

18. Based upon the foregoing, we find that PJM did not abuse its tariff discretion under the tariff in deciding to terminate City Power's membership, especially given the size of the \$17 million default and City Power's failure to pay its other invoices, none of which City Power cured. Accordingly, we deny City Power's request for rehearing.

material. Regardless of whether the amount relating to the May 2012 billing month (\$72.28) is material or not, the Operating Agreement only requires that a member "may appeal a determination made pursuant to the foregoing procedures utilizing PJM's dispute resolution procedure . . . and may be reinstated provided that the [m]ember can demonstrate [*inter alia*, that] the failure to comply was not material" PJM, Intra-PJM Tariffs, Operating Agreement, § 15.1.6(d) (2.0.0). City Power has not made a showing that the \$17 million default was not material. *See also* January 8, 2013 Order, 142 FERC ¶ 61,019 at P 31 (finding PJM reasonably determined City Power could not meet requirement that it had otherwise consistently complied with its obligations).

³⁷ *See* § 15.1.6(d) (2.0.0).

³⁸ *See Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,013, at PP 19-26 (2016) (citing cases holding that public utilities can require repayment of prior distributions when the Commission has committed legal error). Customers may need to set up reserves or make other arrangements to ensure that they can repay funds until proceedings are terminated. *See also Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,231, at P 62 n.96 (2015) (discussing other customers' management of their finances so that they were able to repay PJM and noting market participants need to maintain funds necessary to satisfy their financial obligations to the market).

The Commission orders:

City Power's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.